Nos. 76-245, 76-252, 76-5125 and 76-5242

# In the Supreme Court of the United States

OCTOBER TERM, 1976

THOMAS HURLEY, PETITIONER

*v.*

UNITED STATES OF AMERICA

JEROME DiMURO, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

JOSEPH DOHERTY, PETITIONER

*v.*

UNITED STATES OF AMERICA

ROLAND LUNG AND VICTOR SANTARPIO, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**OPINION BELOW**

The opinion of the court of appeals (Pet. No. 76-252 App. A) is reported at 540 F. 2d 503.

## JURISDICTION

The judgment of the court of appeals was entered on June 29, 1976. Petitions for rehearing were denied on July 19, 1976 (petitioner Lung) and on August 13, 1976 (petitioners DiMuro, Colangelo, and Mantica). On August 13, 1976, petitioner Hurley's motion for leave to file an untimely petition for rehearing was denied. Mr. Justice Brennan extended the time for petitioner Santarpio to file a petition for a writ of certiorari to and including August 18, 1976. The petitions were filed on July 28, 1976 (petitioner Doherty), on August 18, 1976 (petitioners Hurley, Santarpio and Lung) and on August 20, 1976 (petitioners DiMuro, Colangelo, and Mantica). The petition for a writ of certiorari filed by petitioner Hurley (Pet. No. 76-245) is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the evidence was sufficient to establish that petitioners were engaged together in "an illegal gambling business" in violation of 18 U.S.C. 1955. (All petitioners except Hurley.)

2. Whether the district court erred in refusing to give the instructions requested by petitioners concerning the existence of a single gambling business. (All petitioners except Hurley and Doherty.)

3. Whether affidavits in support of a search warrant established probable cause. (Petitioners Hurley and Lung.)

4. Whether petitioner Lung was denied due process by the jury's comparison of his voice exemplar with voices in several intercepted conversations.



## STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioners were convicted of having operated an illegal gambling business, in violation of 18 U.S.C. 1955. Petitioners DiMuro and Santarpio were each fined $3,000 and sentenced to two years' imprisonment; petitioners Colangelo and Mantica were each fined $1,000 and sentenced to 18 months' imprisonment; petitioner Hurley was fined $5,000 and sentenced to two years' imprisonment. Petitioner Doherty was sentenced to 18 months' imprisonment; execution of the sentence, except for three months' imprisonment, was suspended in favor of two years' probation. Petitioner Lung was sentenced to 18 months' imprisonment; execution of the sentence was suspended in favor of two years' probation. The court of appeals affirmed (Pet. No. 76-252 App. A).

The government's evidence at trial was derived principally from two sources: the court-authorized wire interception of communications over a telephone line used by petitioner Santarpio; and gambling paraphernalia seized in subsequent searches of five separate locations used in the gambling business.

Petitioner Santarpio was a participant in each of the 25 intercepted conversations introduced at trial (IV Tr. 102-103). In one set of intercepted conversations he contacted petitioners Hurley and Doherty at 585 Boulevard in Revere, Massachusetts. They informed him of racing results from certain racetracks and gave him other information concerning various horses (III C.A. App. 136-143). In a second set of intercepted conversations, Santarpio telephoned petitioners Colangelo, DiMuro and Mantica, who were conducting a bookmaking operation at the "Handy Lunch Shop" and the "Marsh

Club" in Revere, Massachusetts. Santarpio asked for and obtained race results and "line" information for certain professional sports. These conversations also disclosed the existence of a regular account for lay-off wagers between Santarpio and this operation (III C.A. App. 144, 151-153).

A third set of conversations involved Santarpio and petitioner Lung. On one occasion Santarpio telephoned Lung at 23A Tyler Street in Boston and conveyed to him race results that he had just obtained from petitioner Colangelo (III C.A. App. 133, 157). Lung also laid off several wagers with Santarpio (*id.* at 159-165). On another occasion, after Lung had laid off a wager with Santarpio, Santarpio telephoned petitioner Mantica to see if he could take over a portion of the wager (*id.* at 169-171). Minutes later, Santarpio conveyed to Lung information he had received from Mantica that the horse involved was a "banana" (indicating that the horse had some special advantage, or that the race was fixed (VI Tr. 11)) and that Lung should contact the original bettor and adjust the bet (VI Tr. 63-64; III C.A. App. 172).

On November 13, 1971, agents of the FBI executed search warrants at the "Handy Lunch Shop," at the "Marsh Club," at 585 Boulevard in Revere, and at 23A Tyler Street in Boston. Gambling paraphernalia was seized at each of these locations (I Tr. 3-7, 9, 32, 40-42, 115-116; II Tr. 2-5, 7-10; VI Tr. 18-24, 39-40, 47-51). Betting slips seized from the location maintained by petitioners Hurley and Doherty showed that the wagering volume at that location on a single day had exceeded $52,000 (VI Tr. 49-51).

## ARGUMENT

1. All petitioners except Hurley contend that the evidence was insufficient to support their convictions because it did not show "a gambling business" as required



by Section 1955, but only several unconnected bookmaking operations. This claim is refuted by the record.

The evidence showed that each petitioner engaged in a gambling business with Santarpio by the regular exchange of line information and race results, the making of lay-off wagers, or both. Those transactions are essential to the operation of a gambling enterprise, and persons who engage in such transactions are participating in "an illegal gambling business" under Section 1955. In reviewing the cases that have construed Section 1955, the court of appeals in *United States* v. *Box*, 530 F. 2d 1258, 1266 (C.A. 5), observed:

> The answer has in every case been * * * [that] the regular direct exchange of layoff bets and line information can connect otherwise independent gambling operations, which alone would be illegal under state but not federal law (because less than five participants were involved), into one business.[1]

See also *United States* v. *Joseph*, 519 F. 2d 1068 (C.A. 5), certiorari denied, 424 U.S. 909; *United States* v. *Schaefer*, 510 F. 2d 1307 (C.A. 8), certiorari denied, 421 U.S. 978; *United States* v. *Thomas*, 508 F. 2d 1200 (C.A. 8), certiorari denied *sub nom. Schullo* v. *United States*, 421 U.S. 947; *United States* v. *Sacco*, 491 F. 2d 995 (C.A. 9).

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[1]The government does not contend, as some of the petitioners suggest, that any contact with a professional gambler, however incidental or remote, can tie a person into a gambling business. Compare, for example, *United States* v. *Box*, *supra*. Here the evidence demonstrated that all of the petitioners regularly engaged in transactions with Santarpio that are essential to the operation of a gambling enterprise and are therefore clearly within the scope of Section 1955.

In a Supplemental Brief in Support of Petition for Certiorari, petitioner Doherty relies on *United States* v. *McCoy*, 539 F. 2d 1050 (C.A. 5), for the proposition that the occasional exchange of

Petitioners contend, in essence, that Section 1955 requires proof that every alleged participant in a gambling business has been in direct contact, or has directly engaged in gambling business with every other alleged participant. Such a contention has no support in the cases that have construed Section 1955, and, in view of the nature of gambling operations, would substantially constrict the statute. As the court of appeals observed here (Pet. No. 76-252 App. A6, n. 5):

> Alleged violators of §1955 need not know that the activity they are engaged in also involved numerous other participants. *United States* v. *Brick*, 502 F. 2d 219, 224 (8th Cir. 1974). The fact that various of the appellants may have separate relationships with Santarpio does not make their activity an independent business unassimilable into one overall operation. The legislative history of §1955 indicates that Congress was aware that "bookmaking" does not operate

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line information cannot, without more, connect two persons to one gambling business under Section 1955. The holding of *McCoy* is a narrow one that does not reach the facts of the present case. In *McCoy* the Fifth Circuit held (*id.* at 1060-1062) that the occasional receipt of line information by a defendant does not, without more, establish that he is performing a function "necessary in the operation" of the business of the person giving him that information. Even if the Fifth Circuit's interpretation of Section 1955 is correct, it does not assist petitioner Doherty. The evidence in this case established that petitioners Doherty and Hurley were conducting a gambling business together at the same location and also that Santarpio was conducting a large bookmaking operation. The evidence here included five calls from Santarpio to Hurley and one call from Santarpio to Doherty, in each of which Santarpio asked for and received race results and other information such as whether there were "any bad horses" running in a particular race (III C.A. App. 136-143). This evidence clearly supported the inference that Doherty and Hurley together were performing functions necessary in the operation of Santarpio's business.



> as a unified, centrally coordinated and controlled business enterprise.

2. All petitioners except Hurley and Doherty further contend that the trial court erred in refusing their requested instruction that the government must prove "the existence of a single gambling business" and that if the jury finds that the defendants "were not in the same business, but in separate businesses, then a verdict of not guilty is required" (see Pet. No. 76-252 App. B). That contention is without merit.

With respect to the elements necessary to find a violation of Section 1955, the district court repeatedly instructed the jury that it was required to find that the defendants participated in "*a* business," "*an* illegal gambling business," "*the* business," and similar words clearly denoting a single business (emphasis supplied) (VII Tr. 26-27, 30-34). Thus, the court adequately instructed the jury that the government was required to prove each defendant's participation in one unlawful gambling business.

Petitioners' contention with respect to the instruction relates, therefore, to form, not substance. Moreover, we submit that petitioners' requested instruction would have been erroneous, because it might have incorrectly suggested to the jury that a finding that petitioners' activities were not wholly integrated, and were thus to some degree "separate," would have precluded a finding that they were all engaged in one gambling business within the meaning of Section 1955.

3. Petitioners Hurley and Lung contend that the affidavit in support of the search warrants for the two locations where they were found in possession of gambling paraphernalia set forth insufficient facts to support a finding of probable cause. They argue that because the

conversations tying these specific locations to the gambling operation had been intercepted in June 1971 (Pet. No. 76-245 App. 35a-36a), probable cause had ceased to exist at the time of the execution of the search warrants in November 1971. The court of appeals properly rejected that contention.

The determination of timeliness as an element in probable cause must be made under the circumstances of each case. Where an affidavit indicates a course of continuing criminal conduct, time is of less significance. *Bastida* v. *Henderson,* 487 F. 2d 860, 864 (C.A. 5); *United States* v. *Mustone,* 469 F. 2d 970 (C.A. 1). As the court below held, the facts set forth in the affidavit were sufficient to establish probable cause (Pet. No. 76-252 App. A20):

> In the present case the affidavits for the search warrants for the two locations in question were part of a master affidavit which was submitted in support of warrants for several other locations as well. This affidavit reported numerous intercepted calls during June, 1971 from the Delano Avenue address to each of the locations (including the two locations whose search is challenged here). With regard to many of the other locations there was ample additional information which, as noted earlier, clearly showed continued gambling operations in force at least through the last week of October, 1971. While this additional information obviously cannot serve to demonstrate probable cause for the two challenged locations, nevertheless it can serve as an indication of the protracted and continuous nature of the operations under investigation, * * * and in conjunction with the recitation of numerous intercepted calls to the two locations, can serve to demonstrate the probability of a continuing violation. Under these circumstances we believe the court below reasonably



> concluded that the gambling enterprise which functioned in June had remained operative in November, and we do not disturb its finding as to probable cause. [Citations omitted.][2]

4. There is no merit in petitioner Lung's contention (Pet. No. 76-5242, pp. 2, 14-16) that he was deprived of due process by the presentation of his voice exemplar for comparison with tape recordings of the intercepted conversations.

The comparison between Lung's exemplar and the intercepted conversations was left entirely to the jury. This procedure is analogous to a jury's comparison of a defendant's photograph with surveillance films taken during the course of a bank robbery. It does not involve testimony by a witness who may have been influenced by any suggestive out-of-court identification procedures. Cf. *Simmons* v. *United States,* 390 U.S. 377. Petitioner's reliance upon cases involving such impermissibly suggestive procedures is therefore inapposite. Instead, the procedure used here involves only the jury's right to analyze for itself whether the defendant's voice was one of those involved in gambling conversations. That determination did not violate the Fifth Amendment's protections. See *Holt* v. *United States,* 218 U.S. 245, 252-253.[3]

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[2]In any event, this determination involves only the application of settled principles to the specific facts of this case, and in light of the concurrent findings by both courts below, it presents no issue warranting review by this Court. See *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635.

[3]We note that there was ample circumstantial evidence of Roland Lung's participation in the conversations. One participant in the conversations, who was identified on several occasions as "Roland," gave Lung's home telephone number as his own, and Lung was arrested at the location where petitioner Santarpio had telephoned "Roland" (III C.A. App. 156, 159; I Tr. 115-117; IV Tr. 23).

## CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

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